Supreme Court, U.S.
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No. 85-2053

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

W.J. SCHNEIDER AND K.B. MARCUS,

Petitioners,

v.

CITY OF EAST ORANGE,

Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether, as a matter of law, a New Jersey owner of real property may be constitutionally deprived of its right to challenge its assessment and resulting taxes because its taxes were not paid in full on the date that such challenge is filed, absent any opportunity to cure said non-payment through subsequent corrective conduct (i.e., payment).

2. Whether, as a matter of law, a New Jersey owner of real property assessed at under $750,000 may be confronted with a jurisdictional pre-payment requirement in order to litigate the correctness of its taxes, whereas an owner of property assessed in excess of $750,000 faces no such jurisdictional bar.

PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF NEW JERSEY

A. Petitioners:

1. W.J. Schneider

2. K.B. Marcus

B. Respondent:

1. City of East Orange

C. Respondent-Intervenor:

1. Attorney General of New Jersey

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

W.J. SCHNEIDER and
K.B. MARCUS,

Petitioners,

v.

CITY OF EAST ORANGE,

Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioners respectfully pray that writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this proceeding on March 13, 1986.

OPINIONS BELOW

The currently unreported written opinion of the New Jersey Supreme Court is set forth in Appendix A annexed hereto. The reported written opinion of the Superior Court of New Jersey, Appellate Division is reported at 196 N.J. Super. 587, 483 A.2d 839 (1984) and is reproduced at Appendix B annexed hereto. The unreported transcript of the oral opinion of the Tax Court of New Jersey granting respondent's motion to dismiss Petitioners' complaint, and the order resulting therefrom, are set forth in Appendix C attached hereto.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered March 13, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are Amendment XIV to the Constitution of the United States and Article 8, section 1(a) of the Constitution of New Jersey.

The statutory provisions involved are New Jersey Stat. Anno. 54:2-39 and New Jersey Stat. Anno. 54:3-27.

These provisions are set forth in Appendix D attached hereto.

STATEMENT OF THE CASE

Petitioners W.J. Schneider and K.B. Marcus are the owners of a commercial office building located in East Orange, New Jersey.

On or about August 14, 1979, Petitioners filed a Petition of Tax Appeal to the Essex County Board of Taxation ("County Board") challenging the 1979 assessment of their property. The subject property was assessed by defendant City of East Orange ("Municipality") for the year 1979 as follows:

LAND:	$123,900.00
BUILDING:	$701,000.00
TOTAL:	$825,000.00

After the filing of this petition, the parties exchanged reports of their respective appraisers. The report of Petitioners' appraiser valued the subject property, for the year 1979, at $630,000.00 A hearing of this appeal was conducted by the County Board on October 24, 1979, resulting in a judgment of same date affirming the original assessment.

Thereafter, by Complaint filed on November 13, 1979, Petitioners appealed from this County Board decision to the New Jersey Tax Court, seeking a review of the County Board Judgment on the grounds of valuation (First Count) and discrimination (Second Count).

At the time that Petitioners filed their Complaint to the Tax Court on November 13, 1979, plaintiffs had fully paid their taxes for the first three (3) quarters of the year, except for the sum of $1,920.45, which was paid on November 14, 1979. Petitioners paid their fourth quarter taxes on December 19, 1979, at which time they had satisfied in full all property tax liabilities for the year 1979.

On or about May 29, 1982, or over two and one-half (2 1/2) years after the filing of Petitioners' Complaint to the Tax Court, Respondent Municipality filed a Notice of Motion and supporting Certification seeking, inter alia, to dismiss the 1979 Complaint based upon Petitioners' alleged failure to comply with N.J.S. 54:2-39 (see Appendix D).

This motion was initially argued before the Honorable David E. Crabtree, J.T.C. on June 24,

1982. In an oral decision rendered on that date (Appendix C), the Tax Court below deferred a determination pending the decision by the Superior Court of New Jersey, Appellate Division, of an appeal from the decision of the Tax Court in Powder Mill I Assoc. v. Hamilton Tp., 3 N.J. Tax 439 (Tax Ct. 1981).

Powder Mill was decided by the Appellate Division on June 10, 1983 (190 N.J. Super. 63, 461 A.2d 1199 (App. Div. 1983)). Thereafter, Respondent Municipality renewed its motion to dismiss. Oral argument was heard by the Tax Court below on September 15, 1983 and an oral decision was rendered on that date. The Tax Court below granted defendant's motion, thereby dismissing plaintiffs' appeal for the year 1979, based upon its purported strict construction of N.J.S. 54:2-39 (now N.J.S. 54:51A-1(B)) as imposing an absolute jurisidictional requirement not susceptible to being cured.

This oral decision was subsequently embodied in an Order of Dismissal entered on October 3, 1983 (Appendix C).

Thereafter, Petitioners appealed from this final judgment to the Superior Court of New

Jersey, Appellate Division. While this appeal was pending, the Attorney General of New Jersey was granted leave to intervene in the case in order to defend the constitutionality of N.J.S. 54:2-39.

On appeal to the Appellate Division, Petitioners challenged the final judgment of the Tax Court, alleging the following:

1. That the Court had improperly applied inconsistent statutory constructions to N.J.S. 54:2-39 and 54:3-27;

2. That the decision of the Tax Court had deprived Petitioners of their property without due process of law and in violation of Petitioners' constitutional guaranty to be uniformly assessed and taxed; and

3. That the decision of the Tax Court had deprived Petitioners of their constitutional right to equal protection of the law.

The Appellate Division rejected Petitioners' challenge in a written opinion (Appendix B). Petitioners thereafter sought review of this decision by the New Jersey Supreme Court. The New Jersey Supreme Court granted certification of

the case (see 101 N.J. 229, 501 A.2d 908 (1985)), but affirmed for the reasons expressed by the Appellate Division, in a presently unreported written opinion entered on March 13, 1986 (Appendix A).

Petitioners now seek review by this Court of the United States constitutional issues raised below.

REASONS FOR GRANTING THE WRIT

This case merits review because, if left undisturbed, the decisions below result in the deprivation of a property owner's right to contest his real property assessment, and resulting taxes, if his taxes are not paid in full on a date certain, absent any subsequent opportunity to cure this defect through payment.

Petitioners do not here dispute the notion that a taxing authority may mandate that a taxpayer "pay now and litigate later," but submit that an opportunity must be given to cure a delinquent payment before the constitutionally protected right to be uniformly assessed and taxed is eliminated.

Furthermore, the absolute jurisdictional bar found by the courts below to be imposed by N.J.S. 54:2-39 is to be contrasted with the non-jurisdictional tax prepayment requirement found to exist in N.J.S. 54:3-27. The only difference between these two (2) statutory provisions is the class of taxpayers affected thereby. N.J.S. 54:3-27 applies to property owners with assessments of over $750,000.00, who can, as a result of the level of their assessment, seek direct

review of the New Jersey Tax Court, under a non-jurisdictional tax prepayment requirement. N.J.S. 54:2-39 applies to all other taxpayers, and permits access to the New Jersey Tax Court only if a taxpayer's taxes are paid in full on the date he seeks Tax Court review. If they are not, a taxpayer's subsequent payment will be of no significance, because the statute, as interpreted below, permits no cure. In this fashion, Petitioners submit that they have been deprived of their right to equal protection of the laws.

I. The Due Process Claim

A. The decision of the New Jersey Supreme Court raises an important question of constitutional law that should be settled by this Court.

At the time that Petitioners filed their Complaint to the Tax Court, N.J.S. 54:2-39 provided, in pertinent part, as follows:

> At the time that a complaint has been filed with the Tax Court, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid.

On the basis of this statutory authority, Petitioners' complaint challenging their 1979 assessment (which assessment had been affirmed by the Essex County Board of Taxation) was dismissed, because Petitioners' taxes were not paid in full on the date that their complaint was filed with the Tax Court. The fact that Petitioners' taxes were paid in full five (5) weeks later was not considered significant by the courts below, nor was the fact that respondent municipality did not move for dismissal for more

than two and one-half (2 1/2) years after this short period of non-payment.

Instead, the courts below construed N.J.S. 54:2-39 as imposing an absolute bar to a taxpayer's right to contest their real property assessment, without any notice of or right to cure this allegedly jurisdictional payment prerequisite.

Article 8, § 1(a) of the New Jersey Constitution guarantees that all property will be assessed under general laws and uniform rules. This constitutional guarantee is further buttressed by the equal protection clauses of the State and Federal constitutions, which "...preclude taxing the same class of property at different rates." Robinson v. Cahill, 118 N.J. Super. 223, 277, 287 A.2d 187 (Law Div. 1972), affirmed 62 N.J. 473, 303 A.2d 273 (1973), cert. denied sub. nom Dickey v. Robinson, 414 U.S. 976 (1973).

Implicit in this guarantee is the right of a taxpayer to challenge his assessment if his property has not been uniformly taxed. Airwork Service Division v. Taxation Div. Dir., 2 N.J. Tax 329, 342 (Tax Ct. 1981). Otherwise, a tax-

payer would have a right without a remedy.

In the instant case, the decisions of the courts below have effectively deprived Petitioners of a forum in which to contest the validity of their assessment. In so ruling, Petitioners submit that the courts below have interpreted N.J.S. 54:2-39 so as to deprive Petitioners of due process of law.

Petitioners recognize the general rule that a State may require payment of a tax prior to an opportunity to litigate its correctness. General Trading, 83 N.J. 122, 416 A.2d 37 (1980), N.Y. Susquehanna & W.R.R. v. Vermeulen, 44 N.J. 491, 501-502, 210 A.2d 214 (1965); Powder Mill, supra, 3 N.J. Tax at 439, 448, rev'd 190 N.J. Super. 63 (App. Div. 1983). However, this well-settled principle of law does not end the inquiry in this case, for the statutory provision at issue here (N.J.S.A. 54:2-39), as interpreted by the courts below, does more than simply require that taxes be paid in order to litigate. Rather, the provision has been interpreted to impose an absolute jurisdictional bar to litigation if taxes were not paid on a date certain (the date of the filing of a Complaint to the Tax Court) and years before defendant municipality affirmatively

raised the issue, without any opportunity for the taxpayer to cure this defect.[1] It is this absence of notice and reasonable opportunity to satisfy the procedural requirement of having one's taxes current in order to litigate, which Petitioners assert results in a deprivation of property without due process of law.

This Court has articulated three distinct factors to be considered in deciding whether a denial of due process has occured.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

As stated above, the private interest

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[1] It should be noted that when delinquent taxes are paid, they must be paid together with a substantial interest charge. N.J.S. 54:4-67.

affected by N.J.S. 54:2-39 is Petitioners' constitutional right to be assessed uniformly for local property tax purposes, and the right to challenge the correctness of an assessment constitutes a critical component of this constitutional right. Thus, the lower Courts' misinterpretation of N.J.S.A. 54:2-39 affects a private interest of substantial monetary significance and constitutional character.

With respect to whether additional procedural safeguards would serve a useful purpose, Petitioners submit that they were entitled, at a minimum, to notice in the form of a motion to the New Jersey Tax Court by the municipality. During the requisite two (2) week notice under the New Jersey Court Rules, Petitioners would have the right to pay the taxes for the year under appeal prior to adjudication of said motion and thereby satisfy the procedural requirement contained in N.J.S. 54:2-39. In this manner, Petitioners would be afforded an opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, supra, at 424 U.S. 333, citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Indeed, the taxes at issue in the instant case were fully paid approximately five (5) weeks after the filing of Petitioners'

complaint and absent such notice. The "probable value" of the procedural safeguard of a notice of motion prior to dismissing Petitioners' complaint with prejudice, therefore, would in the instant case be the complete satisfaction of the taxes for the tax year and preservation of Petitioners' "day in Court."

The final consideration in a due process analysis of "the Government's interest" supports affording Petitioners' the opportunity to satisfy the tax indebtedness.

Admittedly, the municipality has an important interest in assuring the uninterrupted flow of tax dollars. However, the municipality is already armed with significant weapons to assure payment compliance, through in rem tax foreclosures and an eighteen percent (18%) interest charge upon delinquent payments, N.J.S. 54:4-67. Perhaps more importantly, the municipality will be deprived of the dismissal weapon contained in N.J.S. 54:2-39, if the taxpayers' view is adopted, only for the period of time necessary to make a motion and receive a decision thereon. If, while this motion is pending, the taxpayer makes the delinquent payment(s), the motion will be denied, but the goal of the statutory threat

(to compel payment) will have been accomplished.

Petitioners submit that this insignificant delay imposed upon the municipality is far outweighed by the absolute, irreversible loss to Petitioners of their constitutional right to be assessed and taxed uniformly.

> The timing and nature of the hearing, therefore, is determined by an accommodation of the competing interests which include the importance of the private interest, the finality of the deprivation, the likelihood of government error and the magnitude of government interests.

Price v. City of Junction, Tex., 711 F. 2d 582, 589 (5th Cir. 1983), citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Petitioners emphasize their recognition of and respect for the governmental interest at stake, and seek through this petition procedural due process sufficient to accomodate both the interests of themselves and the government.

II. The Equal Protection Claim.

A. The decision of the New Jersey Supreme Court raises an important question of constitutional law that should be settled by this Court.

New Jersey law provides for review of a property owner's real property tax assessment by the New Jersey Tax Court via two (2) distinct procedural routes.

First, a taxpayer with an assessment of less than $750,000 can obtain Tax Court review only after an application to and adverse decision from the local county board of taxation. N.J.S. 54:2-39 provides that when this Complaint is filed, all taxes then due and payable must have been paid.

Secondly, a taxpayer with an assessment of more than $750,000 may proceed directly to the Tax Court (without county board review), in which case N.J.S. 54:3-27 governs the requirement that taxes be paid, as follows:

> A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the

> taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed by N.J.S.A. 54:4-66.*

As previously noted, N.J.S. 54:3-29 has been interpreted by the courts below to impose a jurisdictional, non-curable payment requirement. This interpretation is to be contrasted with the judicial interpretation accorded the virtually identical language of N.J.S. 54:3-27, which has been construed to be non-jurisdictional, and susceptible of being cured, in Lecross Assoc. v. City Partners, 168 N.J. Super. 96, 401 A.2d 1099 (App. Div. 1979), certif. denied 81 N.J. 294 405 A.2d 838 (1979)** and Powder Mill I Assoc. supra, 190 N.J. Super. 63 (App. Div. 1983).

Thus, Lecross provides that a taxpayer's complaint will be dismissed for non-payment only

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*N.J.S. 54:4-66 provides that quarterly tax payments are due on February 1, May 1, August 1 and November 1, and thereafter shall be considered delinquent.

**N.J.S. 54:3-27, as it provided at the time of the Lecross decision, was different from the version involved herein only as to the amount of taxes required to be paid (90% versus three quarters.)

after a motion is made by the municipality addressed to that issue, and even then, only if the taxpayer has not cured the delinquency prior to the motion return date.

Furthermore, these two (2) statutes have virtually identical legislative history. Indeed, the legislative history of N.J.S. 54:3-27, which has been interpreted to be non-jurisdictional, provides as follows:

> This bill requires the first three quarters of the taxes assessed for the current year to be paid as an absolute requirement, leaving no question open as to what amount of taxes are to be paid. (Statement to Assembly, No. 2147, dated: July 11, 1977) (emphasis added)

Through these contrasting judicial interpretations of these two (2) statutes, Petitioners submit that N.J.S. 54:2-39 is violative of Petitioners' right to equal protection of the law. Simply stated, had Petitioners sought direct review of their assessment by the New Jersey Tax Court, they would have confronted a pre-payment requirement that was non-jurisdictional and able to be cured. By opting to first seek review by the local county board of taxation, Petitioners unwittingly confronted the jurisdictional payment

requirement of N.J.S. 54:2-39.

Petitioners recognize the significant burden facing them in challenging tax legislation on equal protection grounds, and that "...the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973).

Despite this admittedly wide latitude in the area of taxation, N.J.S. 54:2-39, as interpreted by the courts below, has no legitimate basis for treating small taxpayers (those with assessments of less than $750,000) in a more severe manner than large taxpayers (those with assessments of more than $750,000). As previously noted, neither the legislative language nor legislative history manifest any intention to treat these two (2) classes of taxpayers differently. Indeed, if there were such an intention in the legislation, logic would lead to a more exacting pre-payment requirement for large rather than small taxpayers, the exact converse of the result reached below.

Thus, Petitioners submit that N.J.S.

54:2-39, as interpreted by the Courts below, has unjustifiably imposed upon Petitioners a burden not reasonabley related to a legitimate governmental objective and different from other similarly situated taxpayers.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

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APPENDIX A

SUPREME COURT OF NEW JERSEY

A-30 September Term 1985

W.J. SCHNEIDER and

K.B. MARCUS,

Plaintiffs-Appellants,

v.

CITY OF EAST ORANGE,

Defendant-Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

Argued October 21, 1985 -- Decided March 13, 1986

On certification to the Superior Court, Appellate Division, whose opinion is reported at 196 N.J.Super. 587 (1984).

Alan R. Hammer argued the cause for

appellants (Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, attorneys; Mr. Hammer and Michael Pesce, of counsel; Mr. Pesce and Daniel Keough, on the brief).

Saul A. Wolfe argued the cause for the respondent (Skoloff and Wolfe, attorneys; Mr. Wolfe, of counsel; Robert F. Giancaterino, on the brief).

Harry Haushalter, Deputy Attorney General, argued the cause for the intervenor (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Mr. Haushalter, on the brief).

PER CURIAM

The judgment of the Appellate Division is affirmed, substantially for the reasons expressed in the opinion of Judge Gaynor, reported at 196 N.J. Super. 587 (1984).

CHIEF JUSTICE WILENTZ and JUSTICES CLIFFORD,

POLLOCK, O'HERN, GARIBALDI, and STEIN join in this opinion. JUSTICE HANDLER did not participate.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-509-83T3

W.J. SCHNEIDER and

K.B. MARCUS,

Plaintiffs-Appellants,

v.

CITY OF EAST ORANGE,

Defendant-Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

Argued September 10, 1984 -- Decided November 9, 1984.

Before Judges Morton I. Greenberg, O'Brien and Gaynor

On appeal from the final judgment of

the Tax Court of New Jersey

Alan R. Hammer argued the cause for appellants (Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, attorneys; Mr. Hammer and Michael Pesce, of counsel; Mr. Pesce and Daniel Keough, on the brief).

Robert F. Giancaterino argued the cause for the respondent (Skoloff and Wolfe, attorneys; Saul A. Wolfe, of counsel; Mr. Giancaterino, on the brief).

Harry Haushalter, Deputy Attorney General, argued the cause for the intervenor (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Mr. Haushalter, on the brief).

The opinion of the court was delivered by

GAYNOR, J.A.D.

This appeal from a dismissal of the complaint by the Tax Court involves the construction and constitutionality of N.J.S.A. 54:2-39, now 54:51A-1(b), with respect to the tax payment requirement on an appeal from the Essex County Board of Taxation to the Tax Court. Plaintiffs contend that the court's strict construction of this provision of the statute was inconsistent with the judicial interpretation given to N.J.S.A. 54:3-27 and violated their constitutional rights of due process and equal protection. We disagree and affirm.

Plaintiffs appealed the assessment on their office building for the 1979 tax year to the Essex County Board of Taxation, which on October 24, 1979 affirmed the assessment. On November 13, 1979 an appeal to the Tax Court was filed, at which time all of the taxes then due for that year had not been paid. Payment of the balance of taxes due was made on December 16, 1979. On defendant's motion, the complaint before the Tax Court was dismissed because of plaintiffs' failure to have paid all of the 1979 property taxes at the time of the filing of the complaint in accord with N.J.S.A. 54:2-39. The court reasoned that the statute clearly required the payment and that such provision was a jurisdictional require-

ment for appeal proceedings before the Tax Court.

Plaintiffs argue that the plain language of N.J.S.A. 54:2-39 does not evince a clear and unequivocal intent that taxes for the year involved must be paid as of the date of the appeal from the county tax board to the Tax Court. They contend that the statue must be read consistently with N.J.S.A. 54:3-27, assertedly containing payment language virtually identical to that of the challenged statute, which has been judicially interpreted as not constituting a jurisdictional requirement to a proceeding before a county board or a direct appeal to the Tax Court. It is further suggested that different jurisdictional construction of these two statutes is not supported by legislative intent, inasmuch as the purpose of the tax payment requirement in both statutes was to prevent financial hardship to the municipality resulting from an interruption in the flow of tax revenues. Plaintiffs further assert that the challenged construction violates their equal protection and due process rights.

The defendant municipality contents that the language of N.J.S.A. 54:2-39 evidences an intent

to condition the power of the Tax Court to act upon a complaint filed from a county board judgment on the timely payment of taxes, whereas no such intention is evident form the language of N.J.S.A. 54:3-27. Also, it asserts that plaintiff's equal protection challenge must be rejected because of their lack of standing and the inadequate presentation of this issue to the Tax Court, and because of the waiver resulting from their voluntary election to proceed in accordance with N.J.S.A. 54:2-39 rather than appealing to the Tax Court directly from the assessment. Additionally, the municipality disputes that the tax payment requirement of the subject statute invidiously discriminates against taxpayers or is violative of plaintiffs' constitutional rights.

The Attorney General joins the municipality in asserting the constitutional validity of the statute and argues that its payment requirement is consistent with equal protection and due process standards and is not within the scope of the tax clause of the New Jersey Constitution.

At the time of the filing of the tax court complaint, N.J.S.A. 54:2-39 provided in pertinent part:

> Any party who is dissatisfied with the judgment of the county board of taxation upon his appeal may seek review of that judgment in the Tax Court by filing a complaint with the Tax Court, pursuant to rules of court within 45 days of the service of the judgment of the county board, and the Tax Court shall hear and determine all such matters and render its judgment thereon.
>
> At the time that a complaint has been filed with the Tax Court, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid. No interest shall be due and payable by the appellant for the period from November 1 of the current tax year to the date of filing the complaint.[1]

The plain language of this statute unambiguously indicates that all taxes due and payable for the year involved in the appeal must have been paid at the time of the filing of the complaint. See Powder Mill I Assoc. v. Hamilton Tp., 3 N.J. Tax 439, 445 (Tax Ct. 1981), rev. and

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[1] N.J.S.A. 54:2-39 was repealed by L. 1983, c. 45, effective January 28, 1983. In its place, the Legislature enacted N.J.S.A. 54:51A-1, which replace the second paragraph of N.J.S.A. 54:2-39 with N.J.S.A. 54:51A-1(b), which provides:

> At the time that a complaint has been filed with the Tax Court seeking review of judgment of county tax boards, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid.

remanded on other grounds, 190 N.J. Super. 63 (App. Div. 1983). Where statutory language is plain, unambiguous and uncontrolled by another part of the act or other legislation, a court may not give it a different meaning. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). The mandatory nature of the prepayment provision is supported by the accepted rule that in a proceeding addressed to the statutory jurisdiction of the tribunal compliance with all applicable statutory requirements is necessary for the exercise of that jurisdiction. See General Trading Co. v. Taxation Div. Director, 83 N.J. 122, 127 (1980). That this was the intent of the Legislature is evident from the following portion of the statement of the Senate Revenue, Finance and Appropriations Committee pertaining to the 1977 amendment adding the second paragraph of N.J.S.A. 54:2-39 fixing the obligation to pay taxes pending appeal (L.1977, c. 357, §2, effective January 31, 1978):

> An appellant dissatisfied with the judgment of the county board of taxation may appeal that judgment to the Division of Tax Appeals. There is no direction in current law regarding tax payments. This bill would require that at the time a petition of appeal has been filed with the Division of Tax Appeals all taxes for the current year must

have been paid. Appeals filed with the Division of Tax Appeals are generally after the November 1 quarterly tax installment is due and payable. Thus, this provision requires an appellant to be current in his tax payments notwithstanding the appeal. This imposes no burden of prepayment of taxes on the appellant, and does not put the burden of an appellant's unpaid property taxes on the other taxpayers in a taxing district -- a burden reflected in the reserve for uncollected taxes, and thus in the tax rate. (Statement to Assembly, No. 2147, Dated: July 11, 1977.)

We thus conclude that this provision of the statute was intended to, and by its plain and unambiguous terms does, establish the prepayment of taxes then due as a jurisdictional prerequisite of an appeal to the Tax Court from a county board judgment.

Such construction of the statute is not inconsistent with the interpretation given to N.J.S.A. 54:3-27, the pertinent portion of which is as follows:

> A taxpayer who shall file an appeal appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of

> the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

This statute applies to direct appeals to the Tax Court, Powder Mill I Assoc., supra, 190 N.J. Super. at 69, and to appeals to the county board. See Lecross Associates v. City Partners, 168 N.J Super. 96 (App. Div. 1979), certif. den. 81 N.J. 294 (1979). As noted in Lecross, the statute being silent as to the time when the payment of taxes must be made, the payment requirement is not jurisdictional and "the tribunal's jurisdiction cannot even be questioned until the taxpayer's obligation has in some manner been crystallized by the municipality through the filing of an appropriate defensive pleading, a motion to dismiss, or even by the institution of tax foreclosure prodeedings." Id. at 99-100. The payment language of this statute is not virtually identical with that of N.J.S.A. 54:2-39, as it does not expressly mandate that all taxes due for the year involved be paid when the complaint is filed. This difference in the payment requirements of these statutes warrants the varying jurisdictional construction of their

provisions. There is thus no interpretive inconsistency as urged by plaintiffs.

Assuming plaintiffs have standing and have not waived their right to raise the constitutional issues, we consider those challenges likewise to be without merit. The strict jurisdictional construction of N.J.S.A. 54:2-39 does not result in an infringement of plaintiffs equal protection or due process guarantees. Equal protection does not require that all persons must be treated identically, but rather that "similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same." Levine v. Institutions & Agencies Dept. of N.J., 84 N.J. 234, 256 (1980) (citation omitted). And, unless legislation creates an inherently suspect classification, a legislative classification will be presumed valid, even if it has the effect of treating some differently from others, so long as it bears some rational relationship to a permissible state interest. See Parham v. Hughes, 441 U.S. 347, 351, 99 S. Ct. 1742, ___, 60 L.Ed. 2d 269, 274 (1979). It must be noted that in classifying subjects for different treatment in the field of taxation, a Legislature possesses the greatest freedom in classification. Madden

v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, __, 84 L.Ed. 590, 593 (1940); McKenney v. Byrne, 82 N.J.304, 315 (1980). Thus, in the present case, it was within the Legislature's broad range of discretion to prescribe different jurisdictional requirements for access to the Tax Court by taxpayers who were appealing from a county board decision and those filing initial assessment appeals. Such a distinction has a rational basis in that the former, as contrasted with the latter class, has had the benefit of a hearing as to the correctness of the subject assessments and a determination has been made by a quasi-judicial body establishing the amount of taxes due and payable. As indicated in the legislative history, appeals from the county board generally are filed after the November 1 quarterly tax installment is due and the deferment of this payment during any portion of the appeal period would impose a burden upon the municipality and its taxpayers. This situation does not arise with initial appeals to the Tax Court or the county board as they must be filed by August 15, N.J.S.A. 54:3-21, with judgments of the county board rendered no later than November 15. N.J.S.A. 54:3-26. These different time sequences, and the relationship of each of the procedures to the time when tax payments are due,

afford reasonable support for the difference in the payment requirements applicable to an initial complaint to the Tax Court or a county board and an appeal from a county board to the Tax Court. Accordingly, equal protection is not offended by a strict construction of N.J.S.A. 54:2-39.

Additionally, plaintiffs' right of due process has not been violated by such an interpretation of the statute. The critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review. In re Suspension of Heller, 73 N.J. 292, 310 (1977). The statutory procedures available to plaintiffs for the review of their assessments meets these requirements. N.J.S.A. 54:3-21, et seq. Plaintiffs' opportunity for appropriate review of the county board determination is not impaired by the added procedural limitation that taxes then due be paid before the jurisdiction of the Tax Court can be invoked. The interest of the municipality in receiving timely payment of taxes is clearly significant and outweighs any incidental burden imposed upon plaintiffs, and other taxpayers similarly situated, by this jurisdictional requirement. See Mathews v. Eldridge, 424 U.S., 319, 335, 96 S.Ct. 893, ___, 47 L.Ed. 2d 18, 33 (1976). It is well settled

that a taxpayer may be required to pay the taxes then due as a condition to litigating the amount due. General Trading Co. v. Taxation Div. Director, 83 N.J. 122, 129, (1980); N.Y., Susquehanna & W.R.R. v. Vermeulan, 44 N.J. 491 501, 502 (1965). Plaintiffs' contention that they justifiably relied upon the Lecross decision and the nonexistence, at the time of the filing of the appeal with the Tax Court, of any authority, indicating tht N.J.S.A. 54:2-39 imposed a jurisdictional requirement is misplaced in view of the clear language of the statute and the reliance in Lecross on the absence of any provision in N.J.S.A. 54:3-27 as to the time within which the payment of taxes must be made.

We conclude that the Tax Court lacked jurisdiction to hear plaintiffs' appeal from the county tax board because all taxes then due and payable by plaintiffs were not paid at the time of the filing of the complaint.

Affirmed.

APPENDIX C

TAX COURT OF NEW JERSEY

W.J. SCHNEIDER and K.B. MARCUS,	)	TRANSCRIPT OF RECORDED
	)	PROCEEDINGS
Plaintiffs	)	
	)	Docket Nos. 07-5361A-79
v.	)	07-5361A-80
	)	07-5015A-81
CITY OF EAST ORANGE,	)	
	)	
Defendant	)	
	)	

September 15, 1983
CN 972
Trenton, NJ 08625

B E F O R E:

The Honorable David E. Crabtree

APPEARANCES:

ALAN R. HAMMER, ESQUIRE, Attorney
On behalf of the Plaintiffs, W.J. Schneider and K.B. Marcus

ROBERT F. GRANCATERINO, ESQUIRE, Attorney On behalf of the Defendant, City of East Orange

THE COURT: The next one is W.J. Schneider and K.B. Marcus vs. East Orange. Again, defendant's motion to dismiss for failure to pay taxes.

MR. GRANCATERINO: Same appearance, your Honor, as the previous motion. We've got three separate causes of action here. The first one for the Tax Year 1979, again, we went through oral argument on this, we submitted briefs, approximately a year ago and the purpose of this motion, as I understand it, or this hearing is to supplement any oral argument based on any new light that may have been shed on this ball by counsel.

THE COURT: Cause we understand that in 1979 and Mr. Hammer, you'll correct us if our understanding is incorrect. 1979 is not a direct appeal. '80 and '81 are direct appeals.

MR. HAMMER: That's correct.

THE COURT: And it would appear, from the collector's certification that the taxes were no paid at the time the complaint was filed with this Court with respect to 1979's. Is that correct?

MR. HAMMER: That is correct.

MR. GRANCATERINO: All right, your Honor. From that, we draw the obvious conclusion that the complaint should be dismissed in accordance with 54-239 (sic), the Tammy Brook (phonetic) case. The '80 and '81 cases are direct appeals. The facts are as follows: --

THE COURT: Well, first of all, before we address those two, let's dispose of the '79 first. Mr. Hammer, do you wish to be heard?

MR. HAMMER: Yes, I do. Judge, in preparation for this, I spent a little bit of time reading the cases on this. We are all familiar with LaCrosse. LaCrosse interprets 54:3-27 and finds that whether the taxes are paid is not a jurisdictional question at the County Board level, which would warrant a dismissal of the case. If a motion is made and the taxes are not paid, that's another issue. But the Court in LaCrosse finds a notice is required.

THE COURT: Now are you -- you're addressing '79 now?

MR. HAMMER: '79 only.

THE COURT: All right.

MR. HAMMER: Okay. So that we understand that it's nonjurisdictional as to filing to the County Board. Okay. We've all had the opportunity to read Powder Mill (phoentic). Powder Mill finds and interprets 54:3-21 and said, it's not

even an issue because it's not in the statute. Now, it is my understanding that what we've got here today is really we're dealing with Constitutional questions. We are dealing with a taxpayer's right to be assessed at the same standard as everyone else in a municipality. And I think that denying that right too easily, too quickly, shouldn't be done.

THE COURT: Do you think the requirement that he pay no and litigate later in order to maintain some stability in local budgets is an unconstitutional requirement?

MR. HAMMER: I've got an interest in case here, Judge. By the end of the year, by December 19th, all the taxes were paid. So the question is, how critical is it that when this matter was filed on November 14th -- or let me put it this way. On November 13th the matter was filed in the Tax Court. On the 14th, the third quarter was paid and on one month and five days later, the next quarter was paid. So in all Constitutional questions, we have a little balancing. The hurt town incurs by having one quarter of the taxes paid a month late versus denying this taxpayer, who's assessed at $825,000 in my brief, my expert comes up with two-thirds of that number. My last point is 54:2-39 clearly says you have to pay the taxes. I maintain that we have a problem

with our statutes. I believe these statutes ought to be interpreted consistently, not inconstistently. If you don't need to pay to file with the Tax Court and you don't need to pay to file at the County Board, why do you need to pay to appeal from the County Board to the Tax Court? Why is it not jurisdictional at the county, not jurisdictional at the Tax Court, on a direct appeal, but jurisdictional in the Tax Court on an appeal. Now one further point, the language in 54:3-27 is not any different than 54:2-39. It said you must pay the taxes. So that if--

THE COURT: Except that 54:2-39 is a bit more explicit with respect to the time by which they must have been paid.

MR. HAMMER: Well, 54 --

THE COURT: That's the difference.

MR. HAMMER: Well, 54:3-27 says, taxpayers shall file an appeal, shall pay to the tax collector no less that the first three quarters for the current year in the matter prescribed. Now we know what the matter prescribed is. The Court finds in the LaCrosse case the taxes weren't paid on that date and yet in interpreting that statute, the Court finds it's not jurisdictional. Now we're dealing with an Appellate Division decision. That finds that it's not -- and the Supreme Court -- didn't the Supreme Court

deny certification. So they saw the matter. So that they have held that interpretting (sic) this statute, which you don't have to read too carefully into it says you have to pay the taxes. It says you really don't have to pay the taxes until the motion is made. The Tax Court on a direct appeal and go explain that one to me, why on direct appeal you don't have to pay the taxes, it's not jurisdictional, but on the appeal, it's jurisdictional. I think it doesn't follow. I think before you deprive somebody of their Constitutional right, you have have to have a statute that's clear. You have to have a series of statutes that are not in conflict, that follow each other, follow each other logically and last, but not least, in deciding this issue, you have to value the harm suffered by the municipality versus the harm potentially suffered by the taxpayer. In this case, nobody made any motions, nobody squeezed this guy by his neck, he paid the taxes. He paid the third quarter within twenty-four hours of filing the complaint, he paid the fourth quarter one month later. I think to dismiss this case would be a miscarriage of justice. It really would.

THE COURT: Do you want to respond, Mr. Grancaterino?

MR. GRANCATERINO: Your Honor, I will rely

heavily on Tammy Brook Country Club against Borough of Cresskill. I won't quote to you, because I know --

THE COURT: Is that an -- that's an unreported opinion, isn't it?

MR. GRANCATERINO: That's an unreported Appellate Division decision, but --

MR. HAMMER: I didn't even get a copy. I don't know.

MR. GRANCATERINO: Mr. Hammer, you never seen this case?

MR. HAMMER: No, I don't see them all. I would appreciate if you would send me a copy.

MR. GRANCATERINO: No problem. Judge, I think it's clear that 239 creates a jurisdictional barrier. I'm not going to go over this more times than it's necessary. I just call to your attention that after 239 was interpreted as creating a jurisdictional barrier, and after 3-27 was interpreted, and when I use 3-27, I use the shorthand version. I'm sure we all know what I'm referring to. It was interpreted as an unjurisdictional barrier in LaCrosse. The Legislature reenacted N.J.S.A. 54:2-39 as N.J.S.A., I think, it's 54:51a-2. Just recently. And they changed some of the language. It used to read that when you filed a complaint to the Tax Court, all taxes must be paid. Now, they

changed the language, so when you file a complaint to the Tax Court, on an appeal from a County Board judgment, all taxes must have been paid. Somewhere in there they looked at that particular language, knowing of the cases, and changed it so it refers specifically to an appeal from a County Board of Judgment. That's exactly what we have here. Now, the taxpayer, if he asserted that he needed the opportunity to get the taxes reduced because his property was so overvalued, without having to pay the taxes beforehand, could have gone to the County Board. And would have had the opportunity to pay, at least, only the first three-quarters taxes and have the opportunity to get a reduction, but he didn't do this. I'm sorry, in the direct appeal situation.

The claim that there is a problem with the classification. If you go to the County Board, you don't have to pay your taxes. If you go directly to Tax Court, you don't have to pay your taxes, but if you go to the Tax Court from an appeal from a County Board judgment in the claim that that creates some Constitutional problem, I think, was rejected in the case called Eiffel Tower Coop and I don't know if you've read that one, but that typical type of claim was made. It hasn't been adequately briefed. There has been

no law cited, no Constitutional provision cited. The last thing I want to call your --

THE COURT: Does that case deal with the issue of equal protection?

MR. GRANCATRINO: I think it was just a blanket claim that is unconstitutional. Exactly the same here in the Appellate Division, it said we're not going to deal with such a claim in such an offhand manner.

THE COURT: Do you see any Constitutional problem, Mr. Grancaterino, with permitting a direct appeal for the large property owner. who is not required to pay taxes and the owner of a smaller property, who may not file direct appeal, but under your argument, construing that 54:2-39 and it's successor statute strictly, his case must be dismissed. Do you see any constitutional equal protection problem there?

MR. GRANCATERINO: Well, I think, your Honor, the Legislature is permitted to make those distinctions and as long as there's no showing that the taxpayer couldn't pay it and the Legislature has decided to treat small taxpayers and large taxpayers differently. For whatever reasons, stability of the municipal budget and I argue that both, in that situation, both taxpayers have an adequate opportunity and there is very good reasons for it. For example, let's --

I mean I can speculate on what reason there might be, but for example, under the large taxpayer situation, it takes a lot longer to prepare the case. So if you go on a direct appeal, by the time they get prepared, the issue may have been crystalized and then they have to pay their taxes when the municipality makes a motion on the smaller taxpayer situation. He's got to go to the County Board first. When he goes to the County Board, he's got a form to get relief and he's not required to pay all the taxes on the date that he files his complaint. That's -- I mean we all know that. So I think the large taxpayers and the small taxpayers, from that point of view are being inconsistent. But again, I think that's something for the Legislature to do. I think the upper courts have consistently held that the Legislature is entitled to, if it wants to, make real property tax litigation, refund litigation. So that -- and to create jurisdictional barriers just like they create August 15th as a jurisdictional barrier. And I'm sure I don't have to call your Honor's attention to it, but for the record, we know that the tax court is a court of limited jurisdiction under 2A:3A and the statutes, the finest jurisdiction and one of the statutory requirements of payment of taxes on the date of the complaint is filed, it seems to

me that closes the issue.

MR. HAMMER: If I might just address two points. The point you raised, Judge, as I understood it, the purpose of the statute was to allow municipalities to have the wherewithal to budget and to operate. So Mr. Grancaterino's position on a large appeal, there's other reasons why you don't need the taxes, flies in the face of the intended purpose of the statute. If the purpose of the statute is for the administration of the municipality, we understand that the large taxpayers with large amounts of money are going to have more impact on the administration of that city than the small taxpayer. So to treat a large taxpayer if he doesn't pay his taxes, doesn't have to until the motion and a small entity does, I believe creates a Constitutional equal protection argument. But back to my point, I think we glossed too quickly over the fact that 54:3-27 says, they must pay three-quarters of their taxes. A taxpayer who shall file an appeal from an assessment against him, shall pay to the collector of the taxes in the district not less than the first three-quarters of the tax that he's assessed for the current year. That's a clearly mandatory provision and yet, the Appellate Division --

THE COURT: But it doesn't say when. It

doesn't say when.

MR. HAMMER: In the manner prescribed in 54:4-66. Now if you go to 54:4-66 --

THE COURT: Which are the quarterly due dates.

MR. HAMMER: It says the quarterly due dates. I don't think you have to read into that too quickly to see they have to pay their taxes just like we have to pay our taxes in this case and if LaCrosse finds that nonjurisdictional, it shouldn't be found nonjurisdictional. And again, the facts of this case, I don't always have facts in my favor, but if I ever had facts that were helpful to me, all the taxes paid within one month, it would really be unconsciousable to find against this.

THE COURT: All right, Gentlemen. Thank you very much. The Court has heard the arguments of counsel and it has considered the issue which is nothing more nor less than the strict application of N.J.S.A. 54:2-39, which provides specifically, whenever a complaint was filed with the Tax Court seeking review of County Board judgment, all taxes or any installments thereof, then due and payable, at the time the complaint is filed, must have been paid. Counsels meritorious arguments concerning the Constitutional difficulties inherent in the statutory requirement have been duly

considered and it is this Court's opinion that that the statute must be strictly applied. Any change therein is a matter for the Legislature. Accordingly, defendant's motion to dismiss the 1979 appeal will be granted and this Court strictly construes the language of N.J.S.A. 54:2-39. Defendant's counsel has submitted the appropriate order and the Court will sign it. No, the Court will not sign. It has all three docket number on it. Counsel will prepare the appropriate order for Tax Year 1979 in this case and submit it under the five day rule. Actually, it won't be an order, it will be a judgment.

All right, Gentlemen. We'll now proceed to '80 and '81, which are different matters altogether.

MR. GRANCATRINO: Okay, Judge. It seems to me that the facts in this case, you have a direct appeal, taxes were paid late, after the filing date, but before the motion was made.

THE COURT: Sounds like a little deja vu with Powder Mill, doesn't it?

MR. GRANCATRINO: I rest.

THE COURT: Mr. Hammer, I'm sure you don't want to kick down the door.

MR. HAMMER: I don't have anything to add.

MR. GRANCATRINO: Judge, don't mistake me, I'm not consenting to this now.

THE COURT: I understand. The Court has become pecularly (sic) aware from your repeated appearances here, Mr. Grancatrino, that you seldom concede anything.

Obviously, the situation for Tax Year '80 and '81 is quite different. The Court finds that as those are direct appeals and that the taxes have been paid, prior to the motion, that the recent decision of the Appellate Division in Powder Mill I Associates versus Hamilton Township is squarely in point. Accordingly, defendant's motion to dismiss the cases for those two years will be denied. Plaintiff's counsel will prepare the appropriate order and submit it under the five day rule.

MR. HAMMER: Thank you.

MR. GRANCATERINO: Thank you, Judge.

THE COURT: Thank you, Gentlemen.

W.J. SCHNEIDER and K.B. MARCUS, Plaintiff vs. CITY OF EAST ORANGE, Defendant	TAX COURT OF NEW JERSEY Docket No.: 07-05361A-79 CIVIL ACTION ORDER

THIS MATTER having been opened to the Court upon application of Skoloff & Wolfe, P.A. (Robert F. Giancaterino, Esquire, appearing), attorneys for defendant, for an Order dismissing taxpayer's Complaint for failure to comply with N.J.S.A. 54:2-39 and the Court having reviewed the moving papers and the submission of oral argument.

IT IS on this 3rd day of October, 1983, hereby

ORDERED that taxpayer's complaint filed for the tax year 1979 is hereby dismissed for failure to comply with the tax payment prerequisites of N.J.S.A. 54:2-39

/s/

HON. DAVID E. CRABTREE, J.T.C

APENDIX D

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ASSESSMENT

1. Taxation; assessment

1. (a) Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

54:2-39. Review of judgment of county board

Any party who is dissatisfied with the judgment of the county board of taxation upon his appeal may seek review of that judgment in the Tax Court by filing a complaint with the Tax Court, pursuant to rules of court within 45 days of the service of the judgment of the county board, and the Tax Court shall hear and determine all such matters and render its judgment thereon.

At the time that a complaint has been filed with the Tax Court, all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid. No interest shall be due and payable by the appellant for the period from November 1 of the current tax year to the date of filing the complaint.

If the Tax Court shall determine that the appeal to the county board of taxation has been (a) withdrawn at the hearing, or previously thereto in writing by the appellant or his agent; (b) dismissed because of appellant's failure to prosecute the appeal at a hearing called by the county tax board; (c) settled by mutual consent of the taxpayer and assessor of the taxing district, there shall be no review. This provision

shall not preclude a review by the Tax Court in the event that the appeal was "dismissed without prejudice" by the county board of taxation.

54:3-27. Payment of tax pending appeal

A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

The payment of part or all of the taxes upon any property, due for the year for which an appeal from an assessment upon such property has been or shall hereafter be taken, or of taxes for subsequent years, shall in nowise prejudice that status of the appeal or the rights of the appellant to prosecute such appeal, before the county board of taxation, the State Board of Tax Appeals, or in any court to which the judgment

arising out of such appeal shall be taken, except as may be provided for in section 2 of this act.

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-2053

In The
Supreme Court of the United States
October Term, 1985

W.J. SCHNEIDER AND K.B. MARCUS,
Petitioners,

v.

CITY OF EAST ORANGE,
Respondent,

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioners, W.J. Schneider and K.B. Marcus, are seeking, by writ of *certiorari*, to have this Court review a decision by the Supreme Court of New Jersey sustaining the constitutionality of a statute (*N.J.S.A.* 54:2-39)* on due process and equal protection grounds. Under the New Jersey tax appeal procedure, a taxpayer is entitled to file an initial tax appeal contesting his local property tax assessment with a county board of taxation or, if the assessment exceeds $750,000, directly with the Tax Court of New Jersey. A judgment entered by a county board of taxation is subject to further review at the Tax Court level.

When a taxpayer files an initial tax appeal either with a county tax board or the Tax Court, *N.J.S.A.* 54:3-27 requires the payment of 3/4 of the taxes assessed but not as a jurisdictional requirement to perfect the appeal. Rather, the statute permits a curing at a later date in the event the 3/4 payment of taxes standard was not satisfied at the time the tax appeal was filed. In the event a taxpayer files an appeal with the Tax Court from a county board of taxation judgment, *N.J.S.A.* 54:2-39 requires the payment of all local property taxes due at the time of filing a complaint as a jurisdictional prerequisite to perfecting the tax appeal.

Petitioners raise the following constitutional issues: 1) whether *N.J.S.A.* 54:2-39 violates the Equal Protection Clause in light of an allegedly more favorable payment

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* *N.J.S.A.* 54:2-39 was repealed by New Jersey Law 1983, Chapter 45, effective January 28, 1983. In its place, the New Jersey Legislature enacted *N.J.S.A.* 54:51A-1, which essentially incorporates the same standards contained in *N.J.S.A.* 54:2-39.

standard available under *N.J.S.A.* 54:3-27 to those taxpayers whose assessments exceed $750,000 and who opt to file their initial appeals directly with the Tax Court; 2) whether *N.J.S.A.* 54:2-39 violates the Due Process Clause by preventing taxpayers from litigating tax appeals unless the taxes due are timely paid.

The petitioners are the owners of real property located in the City of East Orange, County of Essex and State of New Jersey. For the 1979 tax year, the property was assessed for local property tax purposes at $824,900 (land—$123,900, building—$701,000). Petitioners filed a petition of appeal with the Essex County Board of Taxation for the 1979 tax year contesting the assessment imposed on their real property under the Local Property Tax Law, *N.J.S.A.* 54:4-1, *et seq.* The Essex County Board of Taxation, following a hearing, entered a judgment affirming the assessment. The petitioners filed a complaint with the Tax Court appealing the County Board judgment.

The respondent municipality, the City of East Orange, filed a motion with the Tax Court seeking a dismissal of the complaint under *N.J.S.A.* 54:2-39 because the petitioners had not paid all of the property taxes due on the date the complaint was filed. The Tax Court heard oral argument on the payment issue and then entered a judgment dismissing the complaint because of petitioners' failure to comply with the tax payment requirement of *N.J.S.A.* 54:2-39 (App. C-15a). Petitioners filed a notice of appeal with the New Jersey Superior Court, Appellate Division from the whole of the judgment of dismissal. The Attorney General intervened in the appellate proceeding to defend the constitutionality of *N.J.S.A.* 54:2-39.

The Appellate Division, in an opinion dated November 8, 1984, sustained *N.J.S.A.* 54:2-39 on due process and equal protection grounds. The Appellate Division found the statutory language to plainly reflect that the payment of the taxes due is a necessary prerequisite to jurisdictionally perfecting a complaint with the Tax Court. Such a procedure under *N.J.S.A.* 54:2-39 was rationally distinguishable from the payment requirement established by *N.J.S.A.* 54:3-27 and applicable to filing a petition of appeal with a county board of taxation. The court recognized that the latter statute did not incorporate a jurisdictional payment standard because the Legislature, in its broad discretion, determined that initial tax appeals should not be jurisdictionally conditioned by a payment of taxes requirement. The Appellate Division held that *N.J.S.A.* 54:2-39 properly employed a jurisdictional payment standard because the taxes due at the time of filing a complaint with the Tax Court following a county board tax appeal had previously been reviewed in a *quasi*-judicial setting. In addition, the Appellate Division held that the statutory payment of taxes requirement did not violate the Due Process Clause since the taxpayers' incidental burden of payment was clearly outweighed by the municipal concern in securing its tax revenues pending a challenge thereto (App. B1a-B13a).

The petitioners filed a petition for certification with the Supreme Court of New Jersey seeking review of the Appellate Division judgment. The petition was granted and, in a decision dated October 21, 1985, the Supreme Court of New Jersey affirmed the Appellate Division judgment substantially for the reasons expressed in the lower court's opinion (App. A1a-A3a).

ARGUMENT

POINT I

THE REQUIREMENT OF N.J.S.A. 54:2-39 TO PAY THE TAXES DUE AT THE TIME OF FILING A COMPLAINT WITH THE TAX COURT IS BASED ON RATIONAL AND PROPER LEGISLATIVE POLICY CONSIDERATIONS AND IS THUS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The procedure by which local property tax appeals are initiated in New Jersey either by taxpayers or municipalities is established by statute. Thus, *N.J.S.A.* 54:3-21 states in pertinent part that,

> A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may on or before August 15 appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer or taxing district may on or before August 15 file a petition of appeal directly with the tax court, if the assessed valuation of the property subject to the appeal exceeds $750,000.00. . . .

In accordance with this provision, a taxpayer or a municipality may file the initial tax appeal with a county board of taxation.* However, in the event that the assessment

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* A county board of taxation is an administrative agency authorized by statute to hear local property tax appeals in a *quasi*-judicial setting. *N.J.S.A.* 54:3-1 *et seq.* A separate county board of taxation sits in each of New Jersey's 21 counties. *N.J.S.A.* 54:3-2.

being challenged exceeds $750,000, either party may file a direct appeal with the Tax Court, thus bypassing the county board of taxation as the initial appeal forum. In the event the initial appeal is heard at the county board level, any party dissatisfied with the judgment entered by the county board may file an appeal with the Tax Court in accordance with *N.J.S.A.* 54:2-39. The Tax Court, therefore, has the jurisdiction to hear initial appeals where the assessment exceeds $750,000 and appeals challenging county board judgments.

The Legislature established certain payment requirements of the current year's taxes related to the filing of tax appeals with both the county boards of taxation and the Tax Court. *N.J.S.A.* 54:3-27 provides that,

> A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

This statute requires the payment of the first three quarters of the taxes assessed in conjunction with the filing of a tax appeal with a county board of taxation. In *Le Cross Associates v. City Partners*, 168 *N.J. Super.* 96, 401 *A.*2d 1099 (App. Div. 1979), certif. den. 81 *N.J.* 294, 405 *A.*2d 837 (1979), the court considered the application

of *N.J.S.A.* 54:3-27, which at that time established a 90% payment standard rather than the existing three-quarters requirement. In that case, the municipality had failed to raise the issue of nonpayment of taxes by the taxpayer at the county board level. The issue was raised for the first time on appeal by the municipality, which claimed that it did not waive said issue since the payment requirement was a jurisdictional condition necessary for the taxpayer to perfect its appeal with the county board of taxation. The court disagreed, noting that the statute was silent as to when payment of the tax monies had to be made and thus reasoned that the payment requirement of *N.J.S.A.* 54:3-27 was not a jurisdictional prerequisite to the filing of a tax appeal with the county board of taxation. The court concluded that noncompliance with the statute did not deprive the county board of jurisdiction to decide the appeal on its merits because the statute did not disclose any purpose to condition the power of the reviewing body to adjudicate upon the making of payment by the taxpayer. Rather, the taxpayer's obligation needed to be crystallized by the municipality through the filing of an appropriate defensive pleading, a motion to dismiss, or even by the institution of tax foreclosure proceedings. *N.J.S.A.* 54:3-27 was thus deemed a collection remedy that could be used by a municipality to dismiss a taxpayer's appeal for nonpayment of the requisite property taxes but was not considered a jurisdictional bar to filing an appeal.

With regard to the tax appeals filed by taxpayers with the Tax Court, the New Jersey Legislature required, under *N.J.S.A.* 54:2-39, that payment of all taxes due must

be made at the time of filing a complaint as a condition to perfecting the appeal. This statute provided that:

> Any party who is dissatisfied with the judgment of the county board of taxation upon his appeal may seek review of that judgment in the Tax Court by filing a complaint with the Tax Court, pursuant to rules of court within 45 days of the service of the judgment of the county board, and the Tax Court shall hear and determine all such matters and render its judgment thereon.
>
> At the time that a complaint has been filed with the Tax Court, *all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid.* No interest shall be due and payable by the appellant for the period from November 1 of the current tax year to the date of filing the complaint. [Emphasis supplied].

In *Powder Mill I Associates v. Hamilton Tp.*, 190 *N.J. Super.* 63, 461 *A.*2d 1199 (App. Div. 1983), the court had occasion to consider whether the jurisdictional payment requirement under *N.J.S.A.* 54:2-39 applied to direct appeals filed with the Tax Court where the assessment exceeded the $750,000 jurisdictional standard. The court concluded that the Legislature did not intend *N.J.S.A.* 54:2-39 to apply to direct appeals and further held that the payment standard of *N.J.S.A.* 54:3-27 applied to direct appeals at the Tax Court level.

The Supreme Court of New Jersey sustained the holdings in *Powder Mill I Associates, supra,* and *Le Cross Associates, supra,* in the present case, thus resulting in the following payment requirements applicable to local property tax appeals:

1. Appeals filed by taxpayers with the county board of taxation, in accordance with *N.J.S.A.* 54:3-27, are

not subject to a jurisdictional payment requirement but are subject to a dismissal in the event the first three quarters of the taxes are not paid and in the further event the municipality moves for such a dismissal.

2. The payment standard under *N.J.S.A.* 54:3-27, which applies to county board appeals, also applies to tax appeals filed by taxpayers directly with the Tax Court and subjects a taxpayer's appeal to a dismissal in the event the first three quarters of the taxes are not paid at the time a motion for dismissal by the municipality is heard.

3. Taxpayers filing complaints with the Tax Court appealing a county board judgment must pay all of the taxes due at the time of filing as a jurisdictional prerequisite to perfecting the appeal.

Clearly the statutory interpretation of *N.J.S.A.* 54:3-27 and *N.J.S.A.* 54:2-39, as sustained by the Supreme Court of New Jersey in the present proceeding, is not reviewable by this Court. It has been consistently recognized that federal courts should intervene in the state judicial process only to correct wrongs of a federal constitutional dimension. *Smith v. Phillips,* 455 *U.S.* 209, 221 (1982). In evaluating issues concerning state law, a federal court must defer to the determinations by the state courts. *Kolender v. Lawson,* 461 *U.S.* 352, 355 (1983). Particularly with regard to the views of the state's highest court concerning issues of state law, such views are binding on the federal courts. *Wainwright v. Goode,* 464 *U.S.* 78, 83, 84 (1983).

The petitioners in this matter maintain that a constitutionally invidious discrimination results because of the different payment requirements that apply to tax appeals in categories 2 and 3. Specifically, they maintain that a taxpayer whose assessment exceeds $750,000 may avoid the jurisdictional payment requirement of *N.J.S.A.* 54:2-39 by filing a direct appeal with the Tax Court and thereby only paying the first three quarters of the taxes due in accordance with *N.J.S.A.* 54:3-27. The petitioners are not attacking the latter statute, but maintain that said statute provides a nonjurisdictional and thus a proper payment standard in comparison to the jurisdictional payment requirement of *N.J.S.A.* 54:2-39. This alleged disparity of treatment is characterized by petitioners as a violation of the equal protection standard of the Fourteenth Amendment.

It is fundamental to constitutional principles that a legislature has a wide range of discretion in establishing classifications and that such discretion is especially broad in the field of taxation:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has . . . been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular

> persons and classes. . . . [*Madden v. Kentucky,* 309 *U.S.* 83, 87-88 (1940); emphasis supplied].

See also *Regan v. Taxation with Representation of Washington,* 461 *U.S.* 540 (1983). These principles were reaffirmed in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 *U.S.* 356, 359 (1973):

> Where taxation is concerned and no specific federal right, apart from equal protection is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers,* 358 *U.S.* 522, 526-527, 3 *L.Ed.*2d 480, 79 *S.Ct.* 437:
>
> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposed no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."

The rationale for this broad view of a goverment's taxing powers has been explained as follows:

> [A tax] is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who

> pay them, and would involve the abandonment of the most fundamental principle of goverment—that it exists primarily to provide for the common good. . . . This court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. [*Carmichael v. Southern Coal & Coke Co.*, 301 *U.S.* 495, 522-523 (1931)].

The complexity of attempting to determine the fairness of taxing schemes was further recognized by this Court in *San Antonio School District v. Rodriguez*, 411 *U.S.* 1, 41 (1973), in which it considered challenges, on equal protection grounds, to Texas' statutory method for financing public education primarily from reveneus collected from local real property taxes. In affirming this statutory financing scheme, this Court stated that,

> [W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some form of taxation. No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

Similarly, in *Exxon Corp v. Eagerton,* 462 *U.S.* 176 (1983), this Court reiterated that it has traditionally applied a "lenient standard of rationality" to economic and commercial matters under equal protection analysis. Clearly, therefore, these decisions establish the broad discretion state legislatures may exercise in formulating fiscal arrangements and further caution against undue interference with a state's fiscal policies.

With these constitutional standards as a backdrop, it is important to analyze the actual operation of the statutory local property tax appeal process in New Jersey. At the initial appeal level, the same payment standard applies to all taxpayers, regardless of the assessed valuation of the property. Thus, a taxpayer filing a tax appeal with the county board of taxation must pay the first three quarters of the taxes in accordance with the applicable standards of *N.J.S.A.* 54:3-27. A taxpayer whose assessment exceeds $750,000 and who opts to file a direct appeal with the Tax Court must comply with that same payment standard. Therefore, all taxpayers, irrespective of the assessed valuation of their property, are subject initially to the same tax appeal payment standard at both the county board and Tax Court levels.

It is only when a taxpayer, whose initial appeal was heard by the county board, files a further appeal with the Tax Court, that the payment standard of *N.J.S.A.* 54:2-39 becomes applicable. This payment standard applies to every taxpayer filing an appeal with the Tax Court chal-

lenging a county board judgment regardless of the assessed valuation of the property in question.*

The statutory appeal procedure permitting a direct appeal to the Tax Court in the event a property assessment exceeds $750,000 is premised on the concept that such an appeal is sufficiently significant to warrant bypassing the county board of taxation. Since in many cases such substantial appeals proceed to the Tax Court anyway, the New Jersey Legislature appropriately provided the direct appeal vehicle in order to promote tax appeal economy and avoid duplicative hearings. The utilization of a monetary standard to determine the jurisdiction of a court is proper since it reflects on the complexity and significance of a dispute. The validity of the monetary standard is not questioned in this case.

Petitioners contend that, since *N.J.S.A.* 54:2-39 establishes a jurisdictional payment requirement that only applies to those taxpayers who file an appeal with the Tax Court from a county board judgment and does not apply to a direct appeal filed with the Tax Court by a taxpayer whose assessment is under $750,000, the statute improperly discriminates against the small taxpayer, *i.e.*, the taxpayer whose assessment is under $750,000. The New Jersey courts below properly questioned the standing of the petitioners to raise this issue of alleged unconstitutional dis-

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* This point is best illustrated in this case. The petitioners' property assessment exceeded $750,000, thereby allowing petitioners the option of having the appeal heard initially by the Tax Court. For whatever reason, the petitioners opted to have the county board hear the appeal. Following the county board judgment, petitioners filed a complaint with the Tax Court challenging the judgment. The payment requirement of *N.J.S.A.* 54:2-39 applied to petitioners as well as to all other taxpayers filing complaints challenging county board judgments, irrespective of the amount of the assessment.

parity since their property was assessed in excess of $750,000. Nevertheless, assuming such standing exists, it is obvious that petitioners completely disregard the applicable equal protection standards in their faulty analysis. The Equal Protection Clause requires that like taxpayers must be treated equally. A taxpayer who files an appeal with the Tax Court challenging a county board judgment has had the benefit of an initial hearing in a *quasi*-judicial setting before a county board of taxation. A taxpayer filing his initial appeal with the Tax Court has had no previous tax appeal hearing. As noted by the New Jersey courts, the New Jersey Legislature obviously felt that a taxpayer filing his initial appeal (either with the Tax Court or county board) should not be subject under *N.J.S.A.* 54:3-27 to a jurisdictional payment requirement because the assessment in question had not been previously reviewed by a *quasi*-judicial body. On the other hand, a taxpayer, whose assessment had been reviewed and perhaps revised by a county board, should comply with a jurisdictional payment requirement to perfect the appeal.

It is noteworthy that *N.J.S.A.* 54:2-39 requires the taxpayer to pay only those taxes due at the time of filing the complaint with the Tax Court. Thus, in accordance with existing practice in the State of New Jersey, an appealing taxpayer dissatisfied with a county board judgment would be mandated to pay only such taxes required by either the county board judgment or the original assessment, whichever is lower, in conjunction with filing the complaint with the Tax Court. This would be particularly beneficial to the taxpayer who receives a reduction in the assessment by the county board but files a complaint with the Tax Court seeking a further reduction. Such a taxpayer would only

be required to pay the taxes assessed in accordance with the county board judgment at the time of filing the complaint rather than paying the greater taxes as originally assessed. In the event the county board increases the assessment, the taxpayer would only be required to pay the taxes in accordance with the lower original assessment, since the original assessment may be restored on appeal.

It is clear, therefore, that the Legislature, in enacting *N.J.S.A.* 54:2-39, required the payment of taxes due at the time of filing the Tax Court complaint based on the rational reason that such taxes had received the approbation of the county board following a full hearing. The Legislature, on the other hand, provided that *N.J.S.A.* 54:3-27 not incorporate a jurisdictional payment prerequisite since the original assessment had not been previously subject to a *quasi*-judicial review. In the context of the Equal Protection Clause, the distinction between the two payment requirements is rationally justified. In light of the broad discretion afforded the Legislature in formulating tax appeal remedies under the Equal Protection Clause, the payment standards under *N.J.S.A.* 54:2-39 and 3-27 are properly distinguishable and thus constitutionally valid.

POINT II

THE STATUTORY REQUIREMENT OF N.J.S.A. 54:2-39 TO PAY TAXES AS A CONDITION TO LITIGATING AN ASSESSMENT IS CONSTITUTIONALLY SOUND SINCE IT ESTABLISHES A VALID GOVERNMENTAL MEANS FOR PROTECTING THE FINANCIAL STABILITY OF MUNICIPALITIES DURING THE PENDENCY OF A TAX APPEAL.

Petitioners maintain that the requirement under *N.J.S.A.* 54:2-39 to pay all taxes due at the time of filing

a complaint with the Tax Court violates procedural due process by denying them the right to litigate the propriety of the assessment because of nonpayment of the taxes. This due process argument is being presented by petitioners notwithstanding that they are entitled to a trial *de novo* at the Tax Court level permitting them the opportunity to fully relitigate the validity of the local property tax assessment.

The due process concept is flexible and requires procedural safeguards which are appropriate for a particular situation. *Morrissey v. Brewer,* 408 *U.S.* 471, 481 (1972). A tax assessment is validly imposed if the taxpayer is provided with an opportunity to challenge the levy before a competent tribunal prior to the assessment being irrevocably fixed. *Nickey v. Mississippi,* 191 *U.S.* 393, 396 (1934).

This Court has provided a three part analysis to be applied in considering whether a statutory scheme denies a party procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge,* 424 *U.S.* 319, 335 (1976)].

In accordance with these standards, the petitioners have not been deprived of any due process rights. First, the petitioners' private interest is the temporary depriva-

tion of the local property taxes. However, if the petitioners prevail in the appeal, they will receive a refund from the municipality of the overpaid taxes in conjunction with interest from the date of payment at 5% per annum within 60 days of final judgment. *N.J.S.A.* 54:3-27.2. Also, the petitioners have not indicated any real prejudice that they would experience from the temporary deprivation of the tax money.

Second, the procedure for appealing tax assessments accords the petitioners the full opportunity for a fair and proper hearing. Petitioners already litigated the validity of the assessment at the county board level, resulting in a reduction of the assessment. At the Tax Court level, petitioners would be accorded a trial *de novo* encompassing a full evidentiary hearing presided over by a Tax Court judge with special expertise in the area of property assessment. See *N.J.S.A.* 2A:3A-2 and 13; N.J. Court Rule 8:1 *et seq.* The petitioners would be entitled to a further appeal of the Tax Court judgment to the New Jersey Superior Court, Appellate Division. N.J. Court Rule 2:2-3(a)(1). In the context of the procedural framework for appealing tax assessments, the petitioners' due process rights are fully secured.

Third, the taxing district has an obvious concern in collecting property taxes in as timely a fashion as possible. Since tax revenues constitute the lifeblood of government, prompt payment of taxes is essential to the proper functioning of government. *Flora v. United States,* 362 *U.S.* 145, 176 (1960); *Phillips v. Commissioner,* 283 *U.S.* 589, 597 (1931). These policy concerns are particularly significant with regard to the prompt payment of

the property tax which is the predominant source of tax revenues for municipalities. *Rosewell v. LaSalle National Bank*, 450 *U.S.* 503, 527 (1981). Therefore, in view of the important municipal concern in timely collecting local property tax revenues, the relatively slight and temporary deprivation of excess tax payments that would be experienced by the petitioners in the event they should succeed in the appeal and the appropriate safeguarding of the petitioners' interest through the tax appeal procedure, the petitioners were not deprived of due process because of the payment requirement established by *N.J.S.A.* 54:2-39.

The common practice of states in requiring the payment of taxes as a prerequisite to the filing of a tax appeal was recognized in *Rosewell v. LaSalle National Bank, supra,* in the context of considering the jurisdiction of federal courts to entertain state tax matters under the Tax Injunction Act, 28 *U.S.C.* § 1341. The latter statute provides that federal district courts,

> . . . shall not enjoin, suspend or restrain the . . . collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

In *Rosewell,* this Court concluded that the "plain, speedy and efficient" standard required the state tax appeal procedure to comply with certain minimal procedural criteria that provide "the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." 450 *U.S.* at 514. This Court noted that the Tax Injunction Act was enacted at a time when it was common for states to require the payment of contested taxes as a prerequisite to filing

a tax appeal and that such a procedure met the plain, speedy and efficient standard of the Tax Injunction Act. This Court observed that Congress, when it enacted the Tax Injunction Act, did not intend to have federal courts interfere with state tax appeal proceedings which required the payment of taxes as a precondition to contesting the tax:

> When it passed the Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. The Senate Report to the Act noted:
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> "It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the states under various agencies to survive while long-drawn-out tax litigation is in progress." S. Rep. No. 1035, 75th Cong., 1st Sess., p.1 (1937). See H.R. Rep. No. 1503, 75the Cong., 1st Sess., p.2 (1937). [450 *U.S.* at 523].

Accordingly, the concept of the payment of taxes as a condition to contesting the imposition of the taxes has been recognized as a long established and basic facet of tax appeal proceedings in this nation.

Similarly, in *California v. Grace Bretheren Church*, 457 *U.S.* 393, 413-414 (1982), this Court again considered the jurisdictional limitations placed upon the federal courts under the Tax Injunction Act to review state tax provisions. This Court held that the California procedure, requiring the payment of a challenged unemployment

tax and the filing of a refund claim through the appropriate appeal route, constituted a "plain, speedy and efficient" state remedy under the federal statute. This Court has thus recognized the propriety of a statutory appeal procedure requiring the payment of taxes as a condition for contesting the tax imposition under the "plain, speedy and efficient" state remedy standard of the Tax Injunction Act. It would be clearly incongruous for this Court to sustain such a procedure under the "plain, speedy and efficient" standard if the payment prerequisite to filing a tax appeal violated fundamental due process. See *Bull v. United States,* 295 *U.S.* 247, 259, 262, 263 (1935). Therefore, the decisions in *Rosewell v. LaSalle National Bank, supra,* and *California v. Grace Brethren Church, supra,* conclusively confirm the validity of tax appeal payment requirements under procedural due process standards.

The policy concerns relating to requiring the payment of taxes prior to instituting a refund claim were further considered in *South Carolina v. Regan,* 465 *U.S.* 367 (1984). In *Regan,* this Court discussed the application of the federal Anti-Injunction Act, 26 *U.S.C.* § 7421 (a),* to a suit filed by the State of South Carolina seeking to enjoin the application of a federal statute denying federal tax exempt status to state obligations issued in bearer rather than registered form. This Court noted

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* The Anti-Injunction Act provides that

> . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed [26 *U.S.C.* § 7421(a)].

that the underlying concept of the Anti-Injunction Act was the proper recognition by Congress that taxes should be paid before a challenge to their imposition may be instituted:

> The analysis in Williams Packing and its progeny of the purposes of the Act provides significant support for our holding today. Williams Packing expressly stated that the Act was intended to protect tax revenues from judicial interference *"and to require that the legal right to the disputed sums be determined in suit for a refund."* 370 *U.S.*, at 7, 8 *L.Ed.*2d 292, 82 *S.Ct.* 1125 (emphasis added). Similarly, the Court concluded that the Act was also designed as "protection of the collector from litigation *pending a suit for a refund,"* *Id.*, at 7-8, 8 *L.Ed.*2d 292, 82 *S.Ct.* 1125 (emphasis added). The Court's concerns with protecting the expeditious collection of revenue and protecting the collector from litigation were expressed in the context of a procedure that afforded the taxpayer the remedy of a refund suit. [465 *U.S.* at 376].

This same concept of premising a challenge to a tax by the payment thereof is equally valid in the context of *N.J.S.A.* 54:2-39.

Therefore, in conclusion, the payment requirement mandated by *N.J.S.A.* 54:2-39 constitutes a means for taxing districts to secure delinquent taxes pending the resolution of an appeal at the Tax Court level. Since the interest of the municipality in securing the prompt collection of delinquent taxes is clear and because the taxpayer subject to the statutory payment requirement is afforded a full opportunity to litigate the contested taxes, the jurisdictional payment standard under *N.J.S.A.* 54:2-39 is consistent with due process standards.

The petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief. The precedents cited in this brief unequivocally establish that neither the equal protection nor due process challenge to the validity of *N.J.S.A.* 54:2-39 raised by petitioners presents a significant issue justifying the further review by this Court. The constitutional principles applied by the New Jersey courts below are well established and were correctly applied to sustain the validity of *N.J.S.A.* 54:2-39. Therefore, the petition should be denied.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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No. 85-2053

In The
Supreme Court of the United States
October Term, 1985

W.J. SCHNEIDER AND K.B. MARCUS,
Petitioners,

v.

CITY OF EAST ORANGE,
Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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STATEMENT OF THE CASE

Respondent does not dispute the basic factual framework set forth in Petitioner's Statement of the Case. However, Petitioner's Statement of the Case is incomplete and requires further detail.

When the 1979 real property tax assessment was made, and the tax bill was issued (pursuant to *N.J.S.* 54:4-64), the taxpayer had until August 15, 1979, the jurisdictional deadline imposed by *N.J.S.* 54:3-21, to file an appeal contesting this 1979 assessment. The assessment, under New Jersey law, was made as of October 1, 1978, pursuant to *N.J.S.* 54:4-23.

Because the real property tax assessment exceeded $750,000, this taxpayer was entitled to choose between filing a tax appeal directly with the New Jersey Tax Court, thereby bypassing the administrative body, the Essex County Board of Taxation, or to file a tax appeal petition first with the Essex County Board of Taxation and then file an appeal from any judgment that would be issued to the New Jersey Tax Court (*N.J.S.* 54:3-21; *N.J.S.* 54:2-39). The taxpayer *elected* to file a petition with the Essex County Board of Taxation challenging its real property tax assessment for the tax year 1979.

In accordance with the "Rules for the County Boards of Taxation", promulgated in the New Jersey Administrative Code, (hereinafter "N.J.A.C."), appraisals of the property were exchanged as required. An appraisal submitted on behalf of the City of East Orange valued the property at $904,600. Pursuant to a hearing held before the Essex County Board of Taxation, a judgment was issued affirming the original real property tax assessment at $825,000.

After the issuance of said judgment, petitioner had 45 days within which to perfect an appeal to the New Jersey Tax Court, pursuant to *N.J.S.* 54:2-39 (now, *N.J.S.* 54: 51A-1).

On November 13, 1979, when petitioners filed its appeal to the Tax Court of New Jersey, a portion of the real property taxes due on the third quarterly due date and all of the real property taxes due on the fourth quarterly due date, as originally assessed and as confirmed after hearing and judgment of the Essex County Board of Taxation, were due and payable but had not been paid and in fact were delinquent. (In New Jersey, real property taxes are due quarterly, with the fourth quarter being due November 1, 1979. *N.J.S.* 54:4-66).

The 1979 tax appeal was not scheduled for pretrial until January of 1982. In December, 1981, a pretrial memorandum was filed by the City of East Orange raising, among other legal issues, the issue of "timely payment of taxes".

A timely motion was subsequently filed by the City of East Orange to dismiss the 1979 complaint on the grounds of lack of jurisdiction for failure to meet the statutory tax payment prerequisite. The Tax Court dismissed the complaint and all New Jersey Courts have affirmed.

SUMMARY OF ARGUMENT

Petitioner's due process claim must be rejected. The New Jersey statutory scheme implements the "pay now, litigate later" principle which has long been approved by this Court in the field of taxation. The New Jersey stat-

ute requires that all real property taxes be current as a jurisdictional prerequisite to filing a complaint from an administrative judgment to the New Jersey Tax Court. This requirement can easily be satisfied by any responsible taxpayer, and is therefore not subject to attack.

Petitioner's equal protection claims should be rejected. Taxpayers appealing county board judgments are required to comply with a more strict tax payment requirement than those taxpayers seeking initial review at the administrative level or the New Jersey Tax Court level, because the former already have had an opportunity for a judicial-type hearing which establishes the taxes due, whereas those taxpayers seeking initial review do not have a similar opportunity.

LEGAL ARGUMENT

POINT I.

THE NEW JERSEY TAX APPEAL SCHEME COMPORTS WITH FEDERAL DUE PROCESS REQUIREMENTS IN ACCORDANCE WITH PRINCIPLES EXPRESSED BY THIS COURT MORE THAN ONE HUNDRED YEARS AGO.

In New Jersey, the procedure to challenge a real property tax assessment has been structured exclusively as a refund process. On an appeal to a county board, the board may hear the case, but may not render relief unless the taxes are paid during the time that the county board of taxation has jurisdiction. *N.J.S.* 54:3-27. *Verden Realty Mgmt. Co. v. City of East Orange*, 5 *N.J. Tax* 637 (Tax Ct. 1983); *N.J.A.C.* 18:12A-1.6(d).

After full quasi-judicial hearing before the county board of taxation a dissatisfied taxpayer may file an ap-

peal from a county board judgment, so long as it is filed within 45 days and all taxes then due have been paid.

If the taxpayer files a complaint seeking review of a county board of taxation judgment and it does not perfect the tax appeal because of its failure to pay all of the real property taxes then due and payable, jurisdiction in the New Jersey Tax Court is lost, and the appeal is subject to dismissal. This sanction is a result of the taxpayer's failure to comply with the statutory prerequisites to perfecting a tax appeal in New Jersey. These real property taxes are otherwise normally due, pursuant to *N.J.S.* 54:4-66. A taxpayer and property owner who complies with his civic obligation to timely pay his real property taxes on the quarterly due date can never be subject to dismissal for lack of jurisdiction on the basis of non-payment of taxes. It is only those taxpayers who become delinquent by withholding funds otherwise due to the municipality who run the risk of dismissal.

This scheme of taxation is designed to promote orderly administration of local government finances, recognized by New Jersey Courts. *F.M.C. Stores Co. v. Bor. of Morris Plains,* 100 *N.J.* 418, 424-425, 495 *A*2d 1313, 1316-1317 (1985).

The tax payment requirements in the context of tax appeals are designed to discourage interruption of the flow of tax revenues during proceedings to challenge real property tax assessments. *Lecross Assoc. v. City Partners,* 168 *N.J. Super.* 96, 98-99, 401 *A*2d 1099, 1100-1101, cert. den. 81 *N.J.* 294 (1979). The legislative history preceding *N.J.S.* 54:2-39 provides that:

> " . . . Thus, this provision requires an appellant to be current in his tax payments notwithstanding the pend-

> ing appeal. This imposes no burden of prepayment of taxes on the appellant, and does not put the burden of an appellant's unpaid property taxes on other taxpayers in the taxing district—a burden reflected in the reserve for uncollected taxes, and thus in the tax rate. . . . The presumption in law in this bill is that a taxpayer is responsible for taxes assessed against him and the filing of an appeal in no way reduces or forgives that liability." [App. 1].

Petitioner's claim herein is that the New Jersey State Legislature may not require the taxpayer to pay the taxes due and payable after an initial quasi-judicial hearing as a prerequisite to continuing the litigation and that it should have an opportunity to perfect the appeal even after the statute of limitation has run. However, this Court more than 100 years ago in *Cheatham v. United States*, 92 *U.S.* 85, (1876) recognized the efficacy, wisdom, and constitutionality of a provision making tax payment a prerequisite to commencing litigation:

> "The general government has wisely made the *payment of the tax claimed* whether of customs or Internal Revenue, a *condition precedent* to a *resort* to the courts by the party against whom the tax is assessed. . . . It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and draw backs speedily adjusted; and the *rule prescribed in this class of cases is neither arbitrary nor unreasonable.*" [92 U.S. at 89, emphasis supplied].

This Court has consistently rejected constitutional attacks upon the "pay now, litigate later" principle:

> "There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue *after payment of tax* and giving a right to sue in case of his refusal to refund, are wanting in due process and therefore there is jurisdiction [to issue injunctive

relief prior to the assessment or collection of any tax]. *But we think it suffices to state that contention to demonstrate its entire want of merit.* [*Dodge v. Osborn*, 240 *U.S.* 118, 122 (1916)]

In *Bob Jones University v. Simon*, 416 *U.S.* 725, (1974) the Court rejected due process attacks against the requirement that the taxpayer pay the taxes first and then engage in refund litigation.

The "pay now, litigate later" principle has been consistently approved and/or applied by this Court. *Flora v. United States*, 357 *U.S.* 63, (1958), aff'd on rehearing 362 *U.S.* 145, (1960). (. . . "it is unmistakably clear that the court understood the statutes of the time to require full payment of an assessed tax as a *condition precedent to the right to sue* the collector for a refund.," 357 U.S. at 68); *Phillips v. Commissioner of Internal Revenue*, 283 *U.S.* 589 (1931). ("Specific objection is made to the provision that collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed. As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount," 283 *U.S.* at 599).

This Court has also consistently found that a State taxation scheme which relegates a taxpayer to a refund suit is a "plain, speedy, and efficient" State remedy sufficient to satisfy the Federal Tax Injunction Act, 28 *U.S.C.* § 1341, and that it is an "adequate legal remedy" and thereby Federal Courts will not interfere with the State Courts. *Shelton v. Platt*, 139 *U.S.* 591 (1891). (There, the State statute required the taxpayer to pay a tax (a license tax) and to sue within 30 days after pay-

ment or be forever barred); *Matthews v. Rodgers,* 284 *U.S.* 521, 526 (1932); *Great Lakes Dredge & Dock Co. v. Huffmann,* 319 *U.S.* 293 (1943) (" . . . it is the Court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that *on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back",* 319 *U.S.* 300-301), *Rosewell v. LaSalle Nat'l Bank,* 450 *U.S.* 503, *reh den* 451 *U.S.* 1011 (1981); *California v. Grace Brethren Church,* 457 *U.S.* 393 (1982).

Rosewell, supra, concerns itself specifically with whether a State procedure for challenging real property tax assessments which required a taxpayer to institute refund litigation (without interest) was a "plain, speedy, and efficient remedy" so as to deprive the Federal Courts of jurisdiction to interfere with the State Court. The taxpayer had refused to pay the property taxes as a condition to instituting the State litigation but instead initiated a Federal action. This Court held that a State remedy is "plain, speedy, and efficient" if it "provides the taxpayer with a full hearing and judicial determination at which [the taxpayer] may raise any and all constitutional objections to the tax" [450 *U.S.* at 515]. This Court held that the application of the "pay now, litigate later" principle was satisfactory especially in light of the fact that when the Tax Injunction Act was enacted, the Legislature was well aware that refund liitgation was an exclusive remedy in many State tax systems. [450 *U.S.* at 523].

Similarly, in *California v. Grace Brethren Church, supra,* this Court rejected a challenge by California churches to a "pay now, litigate later" scheme for unemployment

taxes, finding that the procedure satisfied the requirement that the taxpayer be provided with a full hearing and judicial determination wherein the taxpayer could raise any and all constitutional objections to the tax.[1]

The lower Federal Courts have confirmed that the "pay now, litigate later" principle comports with due process. *DePauw Univ. v. Brunk,* 53 *F.*2d 647 (D.Ct. Mo. 1931) (requiring taxpayer to post a bond in double the amount of the tax, interest and penalty involved prior to litigation did not violate due process even though the taxpayer has the opportunity to litigate the tax only after he has paid the tax in a suit to recover); *District of Columbia v. Berenter,* 466 *F.*2d 367 (D.C.Cir. 1972) ("the failure of the taxpayer to pay all of the challenged taxes levied for the entire fiscal year in question prior to the time their appeal was filed deprived the Tax Court of jurisdiction . . ." [Id. at 376]); *Blackhawk Mining Co., Inc. v. Andrus,* 711 *F.*2d 753 (6th Cir. 1983). (A requirement that appeal be filed within 30 days of assessment of penalty along with the pre-payment of penalty does not violate procedural due process); *B & M Coal Corp. v.*

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[1] In *California v. Grace Brethren Church,* the taxpayer asserted that it was totally exempt from the tax and that the tax was illegal and unconstitutional from its inception. Here, the taxpayer does not challenge the tax as illegal or unconstitutional, nor does it claim that it is exempt from the tax. Rather, it claims that the quantum of the tax is excessive. Therefore, relegating this taxpayer solely to a refund procedure, is significantly less burdensome.

Office of Surface Mining Reclamation & Enforcement, 699 *F.*2d. 381 (7th Cir. 1983).[2]

Application of the tests set forth in *Matthews v. Eldridge*, 424 *U.S.* 319, 335 (1976) confirms the wisdom and propriety of this Court's consistent support of the "pay now—litigate later" principle. It is "founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to the courts of justice", *Taylor v. Secor*, 93 *U.S.* 575 (1876).

The "private interest" that is affected is insignificant and is merely the temporary deprivation of taxpayer's money which, if it prevails, must be returned to the taxpayer within 60 days of the date of final judgment, with interest." *N.J.S.* 54:3-27.2. The requirement that the taxes be paid on a date certain merely compels the taxpayer to be diligent in asserting its rights and does no more than require the taxpayer to comport with basic tenets of good citizenship and pay its taxes in a timely manner to facilitate orderly fiscal administration, as required by *N.J.S.* 54:4-66.

There is no risk of an erroneous deprivation of any of the taxpayer's rights through this procedure. Taxpayer's temporary deprivation of its potential refund is

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[2] In analogous circumstances, this Court has upheld other types of payment prerequisites, such as filing fees, prior to the institution of litigation. *U.S. v. Kras*, 409 *U.S.* 434 (1973); *Ortwein v. Schwab*, 410 *U.S.* 656 (1973); *reh. den.* 411 *U.S.* 922 (1972).

compensated by the payment of interest. *N.J.S.* 54:3-27.2. The requirement of complying with jurisdictional prerequisites to perfecting an appeal is no more or less stringent than the requirement that an appeal be timely filed.[3]

Additional procedural safeguards would be superfluous and unnecessary in this situation. The taxpayer has a right to a full blown quasi-judicial hearing before the various county boards of taxation wherein it has the right of discovery, the right to submit appraisal reports and expert evidence and the requirement that the case be proved by competent evidence. *N.J.A.C.* 18:12A-1.8; 18:12A-1.9(h); 18:12A-1.9(e). It is entitled to this hearing without the requirement that it pay the full year's taxes and without any requirement that it pay the taxes due as a precondition to filing the petition of appeal (although it must pay the first three quarters' taxes as a condition to obtaining relief which Petitioner does not challenge in this matter).

Prior to this quasi-judicial review, the taxpayer has several other opportunities to seek a correction of the assessment. The Tax Assessor makes his assessment as of October 1st of the previous year. *N.J.S.* 54:4-23. He must file his books by January 10 of the subsequent year *N.J.S.* 54:4-35, and he must make these books open to the public after public notice, for purposes of correcting errors. *N.J.S.* 54:4-38. Shortly thereafter the county boards of

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[3] This Court has consistently upheld reasonable statutes of limitations and other jurisdictional prerequisites to commencing litigation. *Wheeler v. Jackson*, 137 *U.S.* 245, 258 (1890); *Jones v. Union Guano, Co., Inc.*, 264 U.S. 171 (1924).

taxation administratively review the books and are entitled to correct any assessment. *N.J.S.* 54:4-46. A taxpayer may communicate with a Tax Assessor or the county board of taxation to obtain relief prior to quasi-judicial hearings before the board. In fact, it is a rather common practice to negotiate with the Tax Assessor or any experts that he may hire when new assessments are proposed to be placed upon the tax rolls pursuant to a revaluation of all property within the municipality. See *N.J.A.C.* 18:12-4.11.

Only after all of the foregoing procedures, and after the taxpayer had a right to a full quasi-judicial hearing was this taxpayer confronted with the jurisdictional prerequisite that his taxes be paid on or before the date that he filed a further appeal to the Tax Court of New Jersey. (If the assessment were reduced, taxes that need be paid for purposes of further appeal are only those as determined by the county board of taxation [*Lecross v. City Partners,* 168 *N.J. Super.* at 100, 401 *A*2d. at 1101-1102]). Further, contrary to Petitioner's claim that he had no opportunity to cure, Petitioner could have easily corrected the jurisdictional defect arising from filing before payment by merely paying the tax and refiling the complaint before the period of limitations expired.

The taxpayer had full notice that his taxes were due as a condition of litigation by virtue of the statute, and upon satisfaction of this jurisdictional prerequisite, within the statutory time limitation, he was entitled to a full opportunity for hearing. Therefore, Petitioner's difficulty here is self-created, and deserves no relief. *See District of Columbia v. Berenter,* 466 *F.*2d 367 (D.C. Cir. 1972).

The "government interest" is prompt satisfaction of real property tax obligations. It is critical given the recognized fact that real property taxes are the most important source of tax revenues for municipalities. *Rosewell v. LaSalle Nat'l. Bank,* 450 *U.S.* at 527 (1981). The prepayment requirement discourages taxpayers from withholding money rightfully due to the municipalities. The statutory scheme promotes *timely* payment of taxes, a critical governmental concern long ago recognized by this Court:

> " . . . taxes are the life-blood of government, and their *prompt and certain availability* an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection . . . " *Bull v. United States,* 295 *U.S.* 247, (1935).

The foregoing procedure could not be fairer or more equitable. Petitioner's alternative, requiring the municipality to again move at the Tax Court level to enforce payment, would in fact encourage taxpayers not to make *timely* payment of taxes. They would gamble on the inevitable delay occasioned by motion procedures. This would in no way serve the obvious legislative purpose of *timely* payment of taxes and in respect of that critical governmental interest, would be a superfluous and meaningless addition to the tax foreclosure and interest penalty provisions of New Jersey law.

POINT II.

THE EQUAL PROTECTION CLAIM

A. INTRODUCTION: THE NEW JERSEY STATUTORY SCHEME

Petitioner's statement of New Jersey law is both incomplete and incorrect.

It is incomplete in failing to state that a taxpayer with an assessment of more than $750,000 has the option of obtaining a hearing before the county board of taxation or proceeding directly to the Tax Court. The election is entirely within the taxpayer's discretion and in either instance must be made before the uniformly applicable August 15th jurisdictional deadline. (*N.J.S.* 54:3-21).

Petitioners are misleading when they suggest that *N.J.S.* 54:3-27 is "non-jurisdictional". Whether called jurisdictional or not, the fact remains that under New Jersey law, if the municipality moves to dismiss the tax appeal in a situation where *N.J.S.* 54:3-27 applies, the appeal is subject to dismissal if the taxes are not paid by the return date of the motion or such additional time as the Tax Court or the county board grants. The statute is merely somewhat less strict than *N.J.S.* 54:2-39 in the sense that the latter requires payment as a prerequisite to filing the appeal.

It can be seen that in New Jersey, the statutory scheme is one of perfect symmetry. *All* taxpayers who appeal from a county board of taxation judgment are required to comply with the requirement that taxes due and payable must be paid as a condition to *instituting* the litigation. All taxpayers who seek an initial level of review by appeal-

ing to the county board of taxation or directly to the Tax Court are confronted with the tax payment requirements of *N.J.S.* 54:3-27. Taxpayers whose assessments exceed $750,000 are afforded the option of filing directly to the Tax Court or filing first with the county board and then the Tax Court.

Consistent with the statutory scheme, taxpayers who file directly with the Tax Court, not having a prior opportunity for judicial or quasi-judicial review, are not required to comply with the more strict tax payment requirements of *N.J.S.* 54:2-39 but instead are required to comply with the tax payment requirements of *N.J.S.* 54:3-27 which, although less strict, nevertheless subject the taxpayer to dismissal if the first three quarters' taxes are not paid.

B. PETITIONER LACKS STANDING TO RAISE THE EQUAL PROTECTION ARGUMENT.

It is readily apparent from Petitioner's "Statement of Questions Presented" that it is asserting the rights of a New Jersey owner of real property assessed at under $750,000. Petitioner, however, is not such a property owner. Petitioner's assessment exceeded $750,000 and he had the option of proceeding directly to the Tax Court (where he is required to file by August 15 but would not obtain a hearing and determination until the following April 1, *N.J.S.* 54:51A-2), or proceeding to the county board of taxation (where he would obtain a decision within three months, *N.J.S.* 54:3-26) and, if he was dissatisfied, then appealing to the Tax Court of New Jersey.

This Court has consistently adhered to the principle that one who raises the constitutional rights of a class must be a member of that class. *E.g. Bailey v. Patterson,* 369 *U.S.* 31, 33 (1962); *Barrows v. Jackson,* 346 *U.S.* 249, 255, (1953).

In the context of an equal protection claim such as that asserted herein, this Court in *Corbitt v. New Jersey,* 439 *U.S.* 212 (1978) noted that: "Defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who make a bad assessment of risks or a bad choice from the consequences of their decision" [at 226]. See also, *U.S. v. Musto,* 540 F. *Supp.* 346 (N.J. Dist. Ct. 1982).

Here, even accepting arguendo Petitioner's view of the New Jersey statutory scheme, Petitioner is admittedly a member of the "privileged" class rather than the "burdened" class, and therefore lacks standing.

C. THE NEW JERSEY SCHEME OF TAXATION COMPLIES WITH FEDERAL EQUAL PROTECTION REQUIREMENTS.

The Legislature is obviously given the widest discretion and freedom to classify in matters of taxation. Petitioner's burden is to "make a most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . ." *Madden v. Kentucky,* 309 *U.S.* 83, 87-88 (1940).

As explained previously, all taxpayers in New Jersey are treated equally when they are similarly situated. Obviously, a taxpayer appealing from a judgment that results from a quasi-judicial hearing confirming an assess-

ment is in a significantly different position than a taxpayer whose first opportunity for judicial type review is before the Tax Court on a direct appeal.

The obvious differences supporting the different classification of appellants in different circumstances could not have been better explained than by the New Jersey Appellate Division:

> "Such a distinction has a rational basis in that the former, as contrasted with the latter class, has had the benefit of a hearing as to the correctness of the subject assessments and a determination has been made by a quasi-judicial body establishing the amount of taxes due and payable . . . These different time sequences, and the relationship of each of the procedures to the time when tax payments are due, afford reasonable support for the difference in the payment requirements applicable to an initial complaint to the Tax Court or a county board and an appeal from a county board to the Tax Court."
>
> [B-13 to B-14].

The difference in treatment rests on a single criterion, whether or not the taxpayer has had the opportunity for quasi-judicial review before the county board of taxation. The statutory scheme thus makes perfect sense and should not be disturbed.

The alleged burden on Petitioners is minute compared to the important governmental interest of timely collection of taxes, and accordingly, Petitioner's equal protection claim should be rejected.

———o———

CONCLUSION

For the reasons set forth above, the Petition for Writ of *Certiorari* presents no important federal question and raises issues that have long ago been decided by this Court adverse to the position of Petitioners, and accordingly the Petition for Writ of *Certiorari* should be denied.

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APPENDIX

SENATE REVENUE, FINANCE AND
APPROPRIATIONS COMMITTEE
STATEMENT TO

ASSEMBLY, No. 2147

[Official Court Reprint]

STATE OF NEW JERSEY

DATED: JULY 11, 1977

The purpose of this bill is to require the payment of the first three quarters of property tax by a taxpayer who files an appeal with the county board of taxation, to require full payment of current year property taxes upon appeal to the Division of Tax Appeals, and to provide for the payment of interest at a rate of 5% instead of 8% per annum on any refund of excess taxes paid as indicated in the final judgment.

Currently, a taxpayer who has filed an appeal from an assessment with the county board of taxation is required to pay 90% of taxes assessed against him for the current year in the manner prescribed in R. S. 54:4-66 (quarterly payment of property taxes). Thus, an appellant taxpayer who files an appeal, for example, on August 3 is required to pay 90% of the taxes due on Feb. 1, May 1, and Aug. 1. The appeal filed, for example, on June 15, or any time after being informed of a new assessment (usually the first week in June with the annual tax bill) would find a tax payment requirement, under the current law, of 90% of the taxes due Feb. 1 and May 1. This bill requires the first three quarters of the taxes assessed for the current tax year be paid as an absolute requirement, leaving no question open as to what amount of taxes are to be paid.

An appellant dissatisfied with the judgment of the county board of taxation may appeal that judgment to the Division of Tax Appeals. There is no direction in current law regarding tax payments. This bill would require that at the time a petition of appeal has been filed with the Division of Tax Appeals all taxes for the current year must have been paid. Appeals filed with the Division of Tax Appeals are generally after the November 1 quarterly tax installment is due and payable. Thus, this provision requires an appellant to be current in his tax payments notwithstanding the pending appeal. This imposes no burden of prepayment of taxes on the appellant, and does not put the burden of an appellant's unpaid property taxes on the other taxpayers in a taxing district—a burden referred in the reserve for uncollected taxes. and thus in the tax rate.

This bill represents a turnaround in State policy regarding payment of property taxes where an appeal is pending. The presumption in law, prior to P. L. 1973, c. 361, was that an appellant was responsible for paying only that amount of tax which he felt was reasonable as reflected in his appeal. With P. L. 1975, c. 361, a requirement that 90% of current taxes be paid was put in law. This gave rise to the disparity of amount of taxes due related to the point in time that the appeal is filed. The presumption in law in this bill is that a taxpaper is responsible for the taxes assessed against him and the filing of an appeal in no way reduces or forgives that liability.